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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942

No. 1059 76

DANT & RUSSELL, INCORPORATED,

Petitioner and Appellant,

vs.

BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and WILLIAM A. SMITH, DOCTOR OSCAR HAUGE, ROGER JESSUP, JOHN ANSON FORD and GORDON L. McDONOUGH, as members of and constituting said Board of Supervisors of the County of Los Angeles, State of California, and J. H. O'CONNOR, County Counsel of the County of Los Angeles, State of California,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE HONORABLE SUPREME COURT OF THE STATE OF CALIFORNIA, AND BRIEF IN SUPPORT THEREOF.

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BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and WILLIAM A. SMITH, DOCTOR OSCAR HAUGE, ROGER JESSUP, JOHN ANSON FORD and GORDON L. MCDONOUGH, as members of and constituting said Board of Supervisors of the County of Los Angeles, State of California, and J. H. O'CONNOR, County Counsel of the County of Los Angeles, State of California,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE HONORABLE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of Dant & Russell, Incorporated, respectfully shows:

Summary and Short Statement of the Matter Involved

An application for a writ of mandate was filed by the petitioner in the Superior Court of the State of California, in and for the County of Los Angeles, directed to respondents as the Board of Supervisors of said county, to compel said Board to cancel personal property assessments levied by the County Assessor for general county purposes, upon Philippine mahogany lumber imported by, owned by petitioner and located in the county. Under the circumstances alleged it is apparent that the lumber was not subject to county taxation and hence the Assessor and Board of Supervisors exceeded their jurisdiction in levying the tax.

The lumber was milled and finished in the Philippines, then shipped to Long Beach in said Los Angeles County. There it was unloaded from the steamship carriers and stored in piles in the yard of a warehouse. The lumber was shipped in individual pieces, not packed nor in any manner bundled together; this is the manner customarily employed by purchasers and shippers of lumber dealing therein. When unloaded it was stacked in piles, one piece upon another. Each shipment was piled separately and kept to itself. From the piles of lumber thus received portions were sold to customers outside of the State of California. No improvements on the lumber were ever made, but it was ever maintained in the original condition in which it was received from the steamship carrier from the Philippine Islands, both as to form and title.

The County of Los Angeles assessed a tax for general county purposes against the lumber of petitioner remaining in the yard at Long Beach on the first Monday of March, 1938, and, also a second assessment was made

on the lumber remaining in the yard on the first Monday in March, 1939. Petitioner paid taxes on these assessments respectively of $276.43 and $521.20; a total of $797.63.

The respondents interposed a general demurrer to the application for writ of mandate as amended. This demurrer, by the trial court, was sustained without leave to amend and judgment denying the application was entered.

Appeal was perfected by petitioners to the District Court of Appeal of the State of California. By the decision of this court the judgment of the trial court on the demurrer was reversed and respondents granted a reasonable time within which to answer.

Respondents thereupon sought a hearing in the Supreme Court of the State of California, which was granted. The case came on before the Court and was submitted upon the briefs on file. Subsequent to the submission the Supreme Court permitted the Attorney General of the State of California to file, as *amicus curiae*, a brief. This brief injected an entirely new point in the controversy. It advanced the theory that the Philippine Islands are not a foreign country and goods arriving therefrom are in interstate commerce; that the constitutional prohibition against the levy of taxes by the state apply only to "foreign countries". This brief came in after submission and no replies thereto were made. The Supreme Court affirmed the judgment of the trial court, but relied solely on the single point raised by the Attorney General and held that the provisions of Article I, Section 10, of the Constitution of the United States that "no state shall, without the consent of the Congress, lay any impost or duty on exports or imports" referred exclu-

sively to goods shipped from a foreign country and inasmuch as the lumber came from the Philippine Islands the lumber in question did not constitute an importation.

Timely motion for a rehearing was made by petitioner and in petitioner's brief the fallacies of the position of the Attorney General and Court were shown, but this motion was denied without an opinion. Thereby the judgment of the trial court on sustaining the demurrer without leave to amend has been affirmed and a final determination of the case has been had in the courts of California. Nothing is left for the trial court to do except to enter judgment for the costs on appeal.

Statement of Jurisdiction.

Petitioner, in argument on its application for the writ of mandamus, and throughout the course of the case in the state courts, specially set up and claimed the right, privilege and immunity from state taxation of its imports of lumber from the Philippine Islands into the United States under the provisions of Article I, Section 10, Clause 2, reading as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

In its petition for the writ petitioner alleges that its property, to wit, the taxes paid, was taken without due process of law and contrary to its rights and immunities

under the Fourteenth Amendment to the Constitution of the United States, in that the property involved was not part of the mass of property of the state, but was immune from such taxation under the above stated clause of the Federal Constitution.

It is accordingly believed that this case is one proper for this application for the issuance of the writ of certiorari directed from this Honorable Court to the Supreme Court of the State of California under the provisions of Subdivision b. of Section 344 of Title 28, United States Code.

The Questions Presented.

The questions presented to the Court in this case, concisely stated, are:

First: Is lumber or other merchandise commercially imported into a state of the United States from the Philippine Islands an import under the purview of Clause 2, Section 10, Article I, of the Constitution of the United States?

Second: Is milled and finished lumber, not packed nor bundled together, but imported by the owner thereof into the State of California in individual pieces in the manner customarily employed by purchasers and shippers of such lumber and then unloaded from the import carrier, stacked in piles, one piece upon another, unchanged in condition or title from date of importation, subjected to a personal property tax of the county in which it is located, by reason of the sale of a portion thereof?

Third: Were the taxes exacted by and received by the county under the guise of its statutory lien taken without due process of law?

Proceedings in the Trial Court.

The petition for writ of mandate [R. pp. 1-8, incl.] alleged that petitioner purchased the lumber in the Philippines all milled and finished, shipped it into California, removed it from the steamship carrier, stacked it in piles, one board on another, and at the respective dates of assessment it was in the identical form as imported. Petitioner paid, in order to release from sale, total taxes of $797.63. Petitioner further alleged that it had no plain, speedy or adequate remedy in the ordinary course of law; that the tax was void: that by said void provisions of the law, its property would be taken without due process of law in contravention to the 14th Amendment to the Federal Constitution.

The respondents interposed a general demurrer. In the argument upon the general demurrer the prohibition of state taxation upon imports of Article I, Section 10, Clause 2, became the center of dispute. This is evidenced by the opinion of the trial court rendering judgment sustaining the demurrer without leave to amend. [R. pp. 12-23.]

The trial court would have granted the writ, as its opinion shows, except for its reliance upon the fallacious reasoning of the Supreme Court of Maine in the case of *Mexican Petroleum Corporation v. South Portland,* 121 Me. 128 (26 A. L. R. 965). Influenced by this decision, it held that a shipment of lumber imported from the Philippines in the customary manner used by dealers there, that is to say, in individual parcels and not packaged or bundled together, constituted as a whole one original package of import. A sale made from that shipment broke the original package. Thereby, notwithstand-

ing the admitted fact that the lumber was scrupulously retained in the original piles, separated from all other property, through a recondite process it became mingled with the property of the state and the owner and importer waived the constitutional immunity from taxation given by Section 10, Article I, of the Federal Constitution.

Decision of the District Court of Appeal.

The opinion on appeal squarely reversed the trial court and held:

> "The law is settled that a state or a subdivision thereof may not constitutionally levy a tax upon a thing during the time it retains its character as an import and remains property of an importer in a warehouse in the original form or package in which it was imported." (Citing Article 1, Section 1, Federal Constitution and Brown v. Maryland and May v. New Orleans.)

It further held that the original package was each individual piece of lumber, since the lumber was not bundled or in any manner bound together and was the identical thing delivered by the consignor to the carrier at the initial point of shipment, and it so remained at all times here in question, and further held that the rule of the Maine case relied upon by the trial court had been expressly disapproved as the law of California. The result of these holdings necessarily gave the rule that the intact remainder of one shipment, consisting as it did of various original packages, was not subject to state taxation. The Court elaborated upon this rule by showing that the mere inclusion of thousands of individual packages into one gross shipment did not change the

character of each piece of lumber as an original package. It clearly stated:

> "The county was without authority to levy a tax upon the lumber which remained in the original packages, and which had not, under the admitted facts, been mingled with the mass of property of this state."

Decision of Supreme Court.

The Supreme Court noted that petitioner contested the taxes involved "on the ground that they are imposed on imports in violation of the provision of Article 1, Section 10, of the Constitution of the United States"; but held that the word "imports" referred exclusively to goods shipped from a foreign country; that the Philippines were not such and therefor the lumber did not constitute an import. It refused to otherwise pass upon or decide the question raised in the trial court and decided by the District Court of Appeal, although requested so to do upon petition for rehearing.

Specification of Errors.

The trial court erred as matters of law in its ruling upon the demurrer in that:

1. It held that thousands of individual parcels of lumber shipped at one time constituted one original package contrary to the admitted averments of the pleading.

2. It held that sale of one or more individual parcels, each constituting an original package, out of a total shipment, subjected the remainder to state taxation.

3. It relied upon and based its decision on the Maine case which had expressly been disapproved as the law of California in the case of *Philippine Refining Corp. v. Contra Costa,* 24 Cal. App. (2d) 665-9.

4. It refused to give effect to the rule of *Brown v. Maryland* that the importation under the Federal law gives the right to sell the thing imported and such right cannot be forbidden.

5. It refused to give effect to the rule of *May v. New Orleans* "that a tax upon the thing imported during the time it retains its character as an import and remains the property of the importer in his warehouse in the original form or package in which it was imported is a duty on imports within the meaning of the Constitution."

The Supreme Court of California erred as a matter of law in its ruling in that:

1. It held that the Philippine Islands, although an unincorporated territory, were domestic within the revenue clauses of the Constitution and subject to the interstate commerce clause.

2. It held that "imports" within the meaning of Article 1, Section 10, Clause 2, refers solely to goods brought into the United States from a country entirely foreign to the United States.

3. It held that imports from the Philippine Islands, once having come to a state of rest in one of the states, are subject to state taxation and form a part of the mass of the property of the state.

Reasons for Allowance of Writ.

Your petitioner respectfully shows that this case is of great and unusual importance for the following five reasons:

1. Governmental: The Insular Tariff Cases determined that the Spanish acquisitions were "foreign to the United States in a domestic sense," not a part of the United States within the revenue clauses of the Constitution, and outside of the restrictions applicable to interstate commerce. The opinion of the Supreme Court of California is in direct opposition to the rule determined by those cases and thereafter consistently acted upon by Congress. This disrupts the very basis of the relations between the states under the compact of the Constitution.

2. Taxation: The decision at bar holds that imports from the Insular possessions are subject to the rule of interstate commerce that shipments when they come to rest are a part of the mass of state property, subject to state taxation and exempt from Federal in opposition to the provisions of Article 1, Section 10, United States Constitution.

3. Jurisdiction: This case is one of first impression in the construction of Article 1, Section 10, of the Constitution applied to imports from the Insular possessions in respect to state taxation.

4. Conflict of Decisions: There exists a direct conflict respectively among the different State Supreme Courts and the Federal Circuit Court of Appeals upon the question of when imports become a part of the property of the state so as to lose the immunity from state taxation under the Federal

Constitution: there is like conflict as to the point above specified in paragraph 2.

5. Practical: The solution of the serious questions here involved is of great and increasing importance to the vast import business of the nation. There are a number of cases awaiting the final decision on this case involving shipments not only from the Philippines, but from Australia and South and Central America.

Your petitioner shows in its brief hereto attached that the case is of universal importance on each of the grounds above stated and therein presents the authorities and reasoning to sustain its position, and presents herewith a certified copy of the entire record in said cause, including the proceedings in the trial court and the Supreme Court of the State of California, and the opinion of said Court.

WHEREFORE, your petitioner respectfully prays that this Honorable Court order that its writ of certiorari issue, directed to the Supreme Court of the State of California, requiring it to certify to this Court a full, true and complete copy of its proceedings and records in the matter for the purpose of review and reversal, and for any other and further adjudication thereon as may to this Court seem fit and proper.

HENRY C. ROHR,
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Attorney for Petitioner.

LOUIS B. STANTON of
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Of Counsel.

State of California, County of Los Angeles—ss.

Louis B. Stanton, being first duly sworn, on oath deposes and says: That he is of counsel for petitioner Dant & Russell, Inc.; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of the record in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the acts in said petition herein stated are true to the best of his knowledge and belief.

LOUIS B. STANTON.

Subscribed and sworn to before me this 6th day of May, 1943.

FRANK M. DAVIS,
Notary Public in and for the County of Los Angeles, State of California.

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari and the allegations thereof are true, as I verily believe, and in my opinion the petition is well-founded and the case is one in which the prayer of the petition should be granted by this Court.

HENRY C. ROHR,
Counsel for Petitioner.

Subscribed and sworn to before me this.....day of May, 1943.

NELLE BARBER,
Notary Public in and for the County of Los Angeles, State of California.